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HEALTH and SAFETY in SCHOOLS: LEGAL OBLIGATIONS OF SCHOOL DISTRICTS / LEGAL RIGHTS OF TEACHERS / STAFF

Submitted by Sarah Gibson
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TABLE OF CONTENTS

1. Presentation outline
2. Summary of Massachusetts Building Code Ventilation Requirements
3. Duty of Towns to Maintain Schools (excerpt, Mass. Gen. Laws. ch. 71 sec. 68)
4. Public Nuisance (Mass. Gen. Laws ch. 111 sec. 122)
5. Requirements of Mass. Right-To-Know Law (Mass. Gen. Laws ch. 111F)
6. Summary of Massachusetts Pesticide Control Act (Mass. Gen. Laws ch. 132B)
7. Summary of Workers' Compensation Statute (Mass. Gen. Laws ch. 152B)
8. Summary of ADA / Mass. Handicap Discrimination Statute
9. Health & Safety Information: Employer's Duty to Provide and Union's Right to Obtain
10. Summary of Massachusetts Public Records Statute (Mass. Gen. Laws ch. 66 sec. 10 and ch. 4 sec. 7 part 26)

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Creating Healthy Schools in Massachusetts Conference

Health and Safety Problems in Schools: Legal Obligations of School Districts; Legal Rights of Teachers/Staff

September 24, 2003

Submitted by Sarah Gibson, Esq.

- I. Legal issues related to building conditions
 - A. Building code
 - B. Duty to maintain schools (M.G.L. ch. 71 sec. 68)
 - C. Obligations flowing from Division of Occupational Safety (M.G.L. ch. 149)
 - D. Public health / nuisance statutes (M.G.L. ch. 111 sec. 122)
 - E. Requirements of School Building Assistance program (construction)
 - F. Specific hazards
 - 1. Right to Know / hazard communication (M.G.L. ch. 111F)
 - 2. AHERA
 - 3. Integrated Pest Management (M.G.L. ch. 132B)
- II. Legal issues related to individual health problems
 - A. Workers' compensation
 - B. Disability and/or accommodations issues (ADA / M.G.L. ch. 151B)

C. Work-related disability retirement

D. Information / privacy issues

III. Legal issues related to collective bargaining obligations and providing information

A. Obligations under public sector collective bargaining statute (M.G.L. ch. 150E)

1. Health and safety as mandatory subject of bargaining

2. Duty to provide information

- a. Duty to provide documents (i.e., building evaluations, etc.)
- b. Employees' right to enter premises to conduct health and safety inspections

3. Prohibition against retaliation

4. Contractual obligations

B. Public records statute (M.G.L. ch. 66 sec. 10 and ch. 4 sec. 7, part 26)

Enclosures:

Summary of Building Code Ventilation Provisions

MGL ch. 71 sec. 68 (excerpt)

MGL ch. 111 sec 122 (Public Nuisance)

Summary of Right to Know statute

Summary of Pesticide Control Act

Summary of Workers' Compensation statute

Summary of ADA/MGL ch. 151B

Summary of duty to provide information (MGL ch. 150E)

Summary of Public Records Statute

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SUMMARY OF MASSACHUSETTS BUILDING CODE

VENTILATION PROVISIONS

780 Code of Massachusetts Regulations §1201 et seq.

The Massachusetts Building Code consists of a series of regulations covering all aspects of a building's construction from the size of its stairways to its structural underpinning. With regard to air quality, the Massachusetts Building Code adopts the ventilation requirements found in the 1993 Building Officials and Code Administrators (BOCA) Mechanical Code. Chapter 12, §1209.1 of the current Mass. Building Code incorporates the requirements of Chapter 16 of the BOCA Mechanical Code: mechanical ventilation systems in school buildings must provide at least 15 cubic feet per minute (cfm) fresh air per occupant in most school areas such as classrooms or libraries. BOCA requires 20 cfm per person in laboratories and gymnasiums.

The current building code applies only to buildings now being built or renovated, however. Buildings built or renovated before the current version of the building code was enacted are subject to the requirements of whatever building code was in effect at the time they were built or renovated. Thus, a school built in 1975 would not have to meet the current fresh air requirement. The building code that was effective prior to the current code required 10 cfm per occupant fresh air in classrooms.

The energy code requirements (780 CMR-13) of the current building code were completely rewritten in June of 2001. The new energy code requirements will have a substantial impact on air quality and ventilation issues. For example, the new energy code requires compliance with ASHRAE Standard 62, Ventilation for Acceptable Indoor Air Quality, which, among other things, establishes standards for the quality and amounts of outdoor air that ventilation systems must supply.

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DUTY OF TOWNS TO MAINTAIN SCHOOLS

Mass. Gen. Laws ch. 71, section 68 provides:

Every town shall provide and maintain a sufficient number of schoolhouses, properly furnished and conveniently situated for the accommodation of all children therein entitled to attend the public schools.

[and]

The school committee, unless the town otherwise directs, shall have general charge and superintendence of the schoolhouses, shall keep them in good order, and shall, at the expense of the town, procure a suitable place for the schools, if there is no schoolhouse, and provide fuel and all other things necessary for the comfort of the pupils. Whenever a town shall undertake to provide a schoolhouse, the town shall appoint at least one member of the school committee or its designee, to serve on the agency, board or committee to which the planning and construction or other acquisition of such schoolhouse is delegated.

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Public Nuisance – Mass. Gen. Laws ch. 111 sec. 122

The board of health shall examine into all nuisances, sources of filth and causes of sickness within its town ... which may, in its opinion, be injurious to the public health, shall destroy, remove or prevent the same as the case may require, and shall make regulations for the public health and safety relative thereto ...

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REQUIREMENTS OF MASS. RIGHT-TO-KNOW LAW

Mass. Gen. Laws ch. 111F sec. 1 et seq.

454 Code of Mass. Regulations sec. 1.01 - 21.09

The purpose of the Right-To-Know law is to protect the health and safety of workers by assuring the communication of relevant information about toxic or hazardous substances in the workplace (454 CMR 21.01)

- I. Employer must clearly label containers of toxic or hazardous substances in the workplace (M.G.L. ch. 111F sec. 7)
 - a. Label must include the chemical name(s) of contents
 - b. Mixtures must be labeled if toxic or hazardous substance(s) constitute 1% or more of a toxic or hazardous substance unless the toxic or hazardous substance is an impurity, in which case labeling is required if the substance is present in amounts of 2% or more
 - c. The labeling requirement does not apply to containers of five pounds or less or one gallon or less
- II. Employer must keep Material Data Safety Sheets (MSDS) on file for each toxic or hazardous substance manufactured, processed, used or stored at the workplace (M.G.L. ch. 111F sec. 11(a))
 - A. Toxic or hazardous are substances regulated as hazardous materials under existing state or federal statutes, and substances on Mass. Substance List
 - B. MSDS must be kept in central location at the workplace (M.G.L. ch. 111F sec. 11(a))
- III. An employer must provide MSDS to an employee or provide evidence of diligent efforts to get MSDS within working four days of receiving a written request from an employee or employee's representative (such as a union). (M.G.L. ch. 111F sec. 11(d))

- A. Providing evidence of diligent efforts to obtain MSDS includes providing employee with copies of correspondence between employer and manufacturer of substance, seller of substance, or state agency enforcing Right-To-Know laws (454 CMR 21.04(3))
- B. If an employee receives neither the requested MSDS nor evidence of diligent efforts to obtain the MSDS, he or she may refuse to work with substance(s) for which the MSDS was requested. (M.G.L. ch. 111F sec. 11(d)) However, public employees may not refuse to provide essential services. (Id.)
 - 1. An employee may continue to refuse to work with a substance until an MSDS is provided; he or she also may refuse to work with a substance if the MSDS provided is incomplete or outdated (454 CMR 21.04(4))
 - 2. An employee must be paid full wages and benefits during his/her refusal to work with a substance for which an MSDS has been requested but not provided; failure of an employer to pay an employee violates statute. An employer may not discharge, discipline or discriminate against an employee for having exercised his or her rights under the Right-To-Know laws (M.G.L. ch. 111F sec. 13; 454 CMR sec. 21.04(4))
- C. An employer is not required to provide an MSDS to an employee who has requested it if the employer has provided complete and up to date MSDS for that substance to that employee within one year (454 CMR sec. 21.06(10))
- IV. Employers must post a notice of employees' rights under the Right-To-Know laws in a central location (M.G.L. ch. 111F, sec. 11(e))
- V. Employers must provide annual training or instruction to employees who are or may be exposed to toxic or hazardous substances during the course of the employee's normal working conditions (M.G.L. ch. 111F sec. 15)
 - A. "Normal working conditions" are conditions arising during employer's regular course of business, including conditions that might reasonably be expected to occur as a result of foreseeable emergency (454 CMR sec. 21.02)

- B. Training may consist of instruction or written materials, must be conducted during normal working hours, and must include (454 CMR sec. 21.07 (1)-(5))
1. detailed explanation of employees' rights, including requirements regarding:
 - a. workplace notices
 - b. container labeling for hazardous substances
 - c. requests for MSDS
 - d. refusal to work with hazardous or toxic substances
 - e. protections against discrimination, discipline, and discharge for exercising rights under Right-To-Know law
 - f. hearings and appeals
 - g. instruction or training
 2. introduction to and explanation of an MSDS and its contents, including
 - a. name, address, emergency number of manufacturer of substance
 - b. preparer's name, address and date
 - c. ingredients and percentages of ingredients in substance
 - d. health information
 - e. permissible occupational exposure limits
 - f. first aid procedures
 - g. physical data (description of substance)
 - h. fire and/or explosion hazards
 - i. reactivity
 - j. employee protection
 - k. other regulatory controls on substance
 3. explanation of how to use the information contained in an MSDS
 4. explanation of labeling requirements for substances that are carcinogenic, mutagenic (causes change in character of a gene or damages DNA), teratogenic (causes abnormal development or birth defects) or neurotoxic (causes damage to nervous system)
 5. explanation of protective clothing or equipment if needed for proper handling of substances used at workplace

- C. An employer must maintain records of training/instruction given to employees, giving description of training, dates training given, names of employees and name of person giving training or instruction

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SUMMARY OF MASSACHUSETTS PESTICIDE CONTROL ACT INTEGRATED PEST MANAGEMENT

Mass. Gen. Laws ch. 132B

In 2000, the legislature adopted a series of amendments to the Massachusetts Pesticide Control Act limiting the use of pesticides in schools (grades K – 12). These amendments contain the following requirements and mandates:

- A. With certain limited exceptions, such as tamper resistant bait stations located in areas inaccessible to students, pesticides may not be used or applied indoors at schools while students are present.
- B. At least two days prior to the use or application of pesticides (with certain limited exceptions) outside of a school, the administration of the school is required to provide a standard written notification to parents and guardians of the children who attend the school. Notices of the use or application also shall be posted in a common area at least two days before the application and for at least 72 hours after the application.
- C. Pesticides may be applied in or around schools solely by or under the guidance of a certified or licensed applicator.
- D. As of November 1, 2000, each school in the Commonwealth is required to adopt, implement and file with the Department of Food and Agriculture an integrated pest management plan defined as follows:

Integrated pest management, a comprehensive strategy of pest control whose major objective is to achieve desired levels of pest control in an environmentally responsible manner by combining multiple pest control measures to reduce the need for reliance on chemical pesticides; more specifically, a combination of pest controls which addresses conditions that support pests and may include, but is not limited to, the use of

Summary of Pesticide Control Act

monitoring techniques to determine immediate and ongoing need for pest control, increased sanitation, physical barrier methods, the use of natural pest enemies and a judicious use of lowest risk pesticides when necessary.

A copy of the plan must be kept on site and made available to the public in accordance with the public records law.

- E. A record of any and all pesticide applications at or around a school must be maintained for five years and be provided on request pursuant to the public records law.

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SUMMARY OF WORKERS' COMPENSATION STATUTE

Mass. Gen. Laws ch. 152

I. Introduction

- A. Workers' compensation is a statutory mechanism for compensating workers who are injured or contract an illness as a result of a condition at work for their inability or reduced ability to earn wages. Workers' compensation is enforced and administered by the state Department of Industrial Accidents (DIA). Although employers in the private sector are required by statute to carry workers' compensation insurance (or be self-insured), public sector employers are permitted to choose whether to use workers' compensation as the means for addressing workplace injury or illness. The vast majority of cities and towns in Massachusetts participate in the workers' compensation system; however, a few do not. Check with the mayor's office, city council or town board of selectmen to determine whether your city or town has chosen to provide workers' compensation benefits to employees.
- B. Workers' compensation replaces the tort or negligence claims a worker might otherwise have against his or her employer for injuries suffered on the job. Unless an employee opted out of workers' compensation at the time of his or her hire, workers' compensation is the only legal action against an employer available to an employee who has been injured or made ill on the job. However, unlike actions in tort, workers' compensation does not require proof that the employer was negligent. The critical issue is whether the illness or injury arose in the course of employment. On the other hand, the amount of compensation available under workers' compensation is strictly limited. Workers who are represented by a union may have additional contractual causes of action (such as a grievance) through a collective bargaining agreement.

II. The general requirements for eligibility for payments under the workers' compensation statute are:

- A. A worker sustained an injury or contracted an illness because of some condition or incident at work;

Summary of Workers' Compensation Statute

- B. The worker notified his/her employer of his/her work-related illness as soon as practicable
- C. The worker filed a claim within four years of becoming aware of the causal relationship between his/her disability and work; and
- D. The injury suffered was not the result of the employee's serious and willful misconduct.
- E. To qualify for most benefits, an employee must have been incapacitated for five days.

III. Injury or illness contracted at work

- A. The injury or illness must arise out of the course of employment. This may include injuries sustained on week-ends or after hours, if an employee is at the workplace for business reasons; it may also include conditions encountered at lunch or going from one work location to another. Injuries sustained during a normal commute are not compensable under the statute. Injuries that arise out of so-called normal wear and tear resulting from a condition (such as prolonged standing and walking) that is common and necessary to all or a great many occupations also are not compensable. Although an employee does not have to prove that his/her employer was negligent, an employee bears the burden of showing that his/her injury or illness is work-related. Before filing a workers' compensation claim, an employee must have assembled medical records and doctors' opinions to support the employee's assertion that his/her illness is work-related.
- B. A compensable injury or illness may include an aggravation of a pre-existing condition that is not work related so long as the work-related condition that has aggravated the pre-existing illness or injury is a major, but not necessarily predominant, cause of disability or need for treatment. However, if the condition that caused the aggravation is common and necessary to all or a great many occupations, the aggravation will be considered normal wear and tear and not be compensable. Also, if an employee knowingly misled his employer about a pre-existing condition at the time of his or her hire and knew that the duties of the job were likely to cause him or her to suffer an injury as a result of the pre-existing condition or to aggravate a pre-existing condition, then s/he will not be eligible for workers' compensation for such an injury or aggravation.
- C. An infectious disease may be a compensable illness if the nature of an employee's work is such that contracting the disease is an inherent risk on the job (e.g., a

Summary of Workers' Compensation Statute

nurse caring for tuberculosis patients).

- D. Emotional or mental disabilities may be compensable if the predominant cause of the disability is an event or series of events occurring within the employment. However, a mental or emotional disability arising out of a bona fide personnel action is not a personal injury or illness for the purposes of the statute.
- E. Certain controversial conditions, such as multiple chemical sensitivity, have been rejected as compensable illnesses for the purposes of compensation under the statute because of problems in proving causation.

IV. Types of workers' compensation benefits

A. Income replacement benefits

- 1. An employee who is disabled may receive benefits equal to a portion of his/her wages to serve as replacement for the income that s/he is unable to earn. For total incapacity, an employee is entitled to receive 60% of the lesser of his or her average weekly wage and the average weekly wage in Commonwealth as calculated by the DIA as an income replacement benefit.
- 2. The amount of income replacement benefits that a worker may receive depends on whether the injury is permanent or temporary; on whether the injury is totally or partially disabling; on whether the employee has some earning capacity even with the injury.
- 3. Some collective bargaining agreements may have provisions under which workers are able to make up the difference between workers' compensation benefits and their full salary.

B. Medical benefits

- 1. An employee who has sustained a work-related injury or illness is entitled to have any "adequate and reasonable" treatment for his/her condition paid for by the employer or employer's workers' compensation insurer.
- 2. The determination of what is "adequate and reasonable" is accomplished in part through regulations and treatment guidelines promulgated by the DIA and in part through medical testimony at hearings on workers' compensation claims.

Summary of Workers' Compensation Statute

C. Loss of function benefits

1. Where an employee suffers a permanent decrease in function of some body limb, organ or system, s/he may be entitled to benefits that compensate him/her for that loss. This is in addition to any other benefits, such as income replacement, that s/he may receive.
2. This is workers' compensation's version of "pain and suffering" compensation.
3. These benefits are calculated according to the location and severity of the injury.

D. Others

1. Rehabilitation benefits: payments by the workers' compensation insurer for costs of vocational counseling and training if worker cannot return to former job or has an earning capacity markedly reduced from his/her pre-injury state.
2. Death benefits: includes funeral expenses and survivor benefits when worker dies on the job.
3. Double benefits: where an employer engages in "serious and willful" behavior that endangers an employee and subjects him/her to unsafe conditions, an injured employee may be eligible for double income replacement benefits. The employer's behavior must be quasi-criminal in nature in order for these benefits to be available.

V. The workers' compensation process

A. When an event occurs that injures a worker, or when a worker becomes disabled because of a work-related illness, s/he normally notifies his/her employer of the condition.

1. The employer may voluntarily begin to pay the employee workers' compensation benefits.
2. This is "without prejudice" for a limited period of time -- i.e., the employer may notify the employee that it intends to stop payments.

B. If the employer does not voluntarily start paying benefits, the employer may notify

Summary of Workers' Compensation Statute

the employee that the employer contests the claim -- i.e., that the employer does not admit that the injury or illness is work-related, or that the employee is disabled.

- C. The employee may file a claim with the DIA by completing a form that describes the nature of the injury, when it occurred, etc. (Often an employee may seek an attorney to file the claim on his or her behalf). The claim should include medical reports from a doctor verifying that the injury is work-related and that it is disabling or partially disabling to the employee.
- D. The employer or its workers' compensation insurer files a response to the claim -- often denying the claim (i.e., contesting liability).
- E. The DIA assigns the claim to a conciliator who meets with the employee and his/her representative, and the employer or insurer. The purpose of the conciliation is to try to determine what issues are in dispute, and see whether the employer/insurer might accept the claim for a particular period of time. Sometimes the employer/insurer and employee reach an agreement on payment for a certain period of time of the injury.
- F. If the parties do not reach an agreement, the DIA assigns the case to a conference. This is a hearing before a DIA judge. Both parties must present their evidence in summary form, must submit all available medical and other reports that will be part of the case, and identify for the judge whom their witnesses will be (i.e., the employee, witnesses to the incident that caused the injury or illness, experts such as doctors or inspectors of the workplace).
- G. Based on the summary of evidence presented at the conference stage, the judge issues a preliminary order, either denying the claim (finding no liability on the part of the employer) or ordering the employer to start paying workers' compensation benefits. Either party may appeal this conference order.
- H. If either party appeals the conference order, the case goes on to a hearing, usually before the same judge who heard the summary of evidence at conference. At hearing, each side presents its case in full, with witnesses either in person before the judge, or via recorded questioning, presented by video or with a written transcript. Based on all the evidence, the judge issues a ruling in the case, determining whether the employer is liable, to what extent the employee is disabled, to what extent the employee can earn some wages, and the period for which the employee's disability has lasted or will last.
- I. A significant change in an employee's condition may result in a petition to the

Summary of Workers' Compensation Statute

DIA from either an employee or an employer/insurer to revisit the employee's condition and possibly make changes in the amount or type of benefits being paid.

VI. Return to work

- A. An injured employee who returns to work and is able to perform the essential functions of a particular job with or without reasonable accommodation is deemed to be a qualified handicapped person under the state handicap discrimination law and may be eligible for some kind of accommodation. An employer may not discriminate against an employee because that employee exercised any of his or her rights under the workers' compensation law.
- B. If an employee returns to work and is re-injured, the workers' compensation statute provides for a streamlined process for resuming workers' compensation benefits, if the re-injury occurs within 2 months of returning to work.

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Summary of Requirements Americans with Disabilities Act (ADA) and the Massachusetts Handicap Discrimination Statute

42 U. S. C. 12101 et seq.; Mass. Gen. Laws Chapter 151B, Section 4

I. Conduct prohibited:

Employment discrimination against qualified individuals with disabilities, in job application procedures, hiring, advancement, discharge, compensation, job training and all other terms, conditions and privileges of employment. It also includes refusing to make reasonable accommodations for qualified individuals.

(Note: terminology used in this summary is from the ADA; M. G. L. c.151B terminology is somewhat different but requirements are essentially the same)

II. Definitions:

A. An **individual with a disability** is an individual who:

has a **physical or mental impairment** that substantially limits one or more of his/her **major life activities**, has a record of such an impairment or is regarded as having such an impairment

1. **Physical impairment:**

Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine. However, in Sutton v. United Airlines and two companion cases, the U.S. Supreme Court found that if an impairment has been corrected through treatment or other corrective measures so that it no longer interferes with a person's ability to function normally (i.e. does not interfere with a major life activity) then it no longer qualifies as a physical impairment for the purposes of the ADA. For example, a person who wears glasses or takes insulin will probably be found not to have a disability under the ADA and therefore will not qualify for the ADA's protections. It is not yet clear how the courts will treat diseases such

as asthma in which the symptoms are recurrent but treatable. The Supreme Judicial Court of Massachusetts has specifically rejected Sutton's conclusions in the state's handicap discrimination statute.

2. **Mental impairment:**

Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

3. **Major life activities:**

Examples include walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, caring for oneself and working. But note that for an impairment to interfere with the major life activity of working it must interfere with an individual's ability to work in general rather than at a specific job or site.

B. A **qualified individual with a disability** is an individual with a disability who:

meets the skill, experience, education, and other job-related requirements of a position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of a job.

III. Reasonable accommodation requirement:

Upon being requested to do so, an employer must make a **reasonable accommodation** to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would cause an **undue hardship** on the operation of its business.

A. Examples of reasonable accommodations:

- making existing facilities readily accessible to an individual with a disability
- job restructuring by reallocating or redistributing marginal job functions
- altering when or how an essential job function is performed
- modifying work schedules
- reassignment to a vacant position
- acquiring or modifying equipment or devices

- permitting use of accrued paid leave or unpaid leave for necessary treatment
- providing reserved parking for a person with a mobility impairment
- allowing an employee to provide equipment or devices that an employer is not required to provide
- for an individual with asthma, having a window that opened in her work space

B. Undue hardship defense:

Undue hardship describes a possible accommodation that is excessively costly, extensive, substantial or disruptive or that would fundamentally alter the nature or operation of the business.

Factors which may be considered:

- size and resources of the employers business;
- type of employer's operation, including the composition and structure of the workforce (and terms of any collective bargaining agreements);
- nature and cost of the accommodation;
- whether furnishing the accommodation will prevent the employer from providing service required by and in compliance with state or federal law or regulations; and
- whether providing the accommodation will unduly compromise the health or safety of the public.

IV. Remedies

Under both state and federal laws, injunctive relief (i.e. a court order directing an employer to do something such as institute a particular reasonable accommodation) and money damages are available. However, a recent Supreme Court decision, Board of Trustees of the University of Alabama v. Garrett, held that the eleventh amendment of the U.S. Constitution prevents individuals from suing states for money damages under the ADA. This means that if a state university fires a professor because of a disability, in violation of the ADA, the professor may sue for reinstatement but not for money damages, such as lost compensation.

The eleventh amendment of the U.S. Constitution would not affect a state employee's right to sue his/her employer for money damages flowing from a violation of a state statute, such as Mass. Gen. Laws. Ch. 151B, the state handicap discrimination. In addition, since the eleventh

Law Office of Sarah Gibson
Summary of Requirements (ADA)

amendment does not apply to municipalities, local school committees are not exempt from suits for money damages under either federal handicap discrimination law (the ADA) or state handicap discrimination law.

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HEALTH & SAFETY INFORMATION:

An employer's duty to provide information and a union's right to obtain information

A public employer has a duty under Mass. Gen. Laws ch. 150E sec. 10(a)(5) and (1) to supply unions/employees with relevant information that is reasonably necessary to the union's performance of its responsibilities as exclusive bargaining representative.

Whittier Regional School Committee, 19 MLC 1183, 1185 (1992)

If a public employer possesses information that is relevant and reasonably necessary to a union in the performance of its duties as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the union's request. Board of Trustees, University of Massachusetts (Amherst), 8 MLC 1148, 1149 (1981). The union's right to receive relevant and reasonably necessary information is derived from the statutory obligation to engage in good faith collective bargaining including contract negotiations and contract administration. Boston School Committee, 24 MLC 8, 11 (1998), citing Boston School Committee, 10 MLC 1501, 1513 (1984). Absent legitimate considerations, a union has a right to information which may explain a public employer's proposals, and assist a union in formulating reasoned counter proposals. City of Boston, 24 MLC 39, 42 (1997); Massachusetts State Lottery Commission, 22 MLC 1468, 1472-1473 (1996).

City of Boston School Committee and Boston Public School Buildings Custodians' Association, MUP-9794, p. 8ff, (1999).

The standard for determining whether requested information is relevant is liberal, and is similar to the relevance required for discovery in a civil proceeding. Id. A union's right to relevant information overcomes a claim of confidentiality in the absence of a showing of great likelihood of harm flowing from the disclosure.

Board of Trustees.

A union has the right to obtain copies of all reports of evaluations of a workplace; proposals for health and safety precautions for employees; proposals for remediation, etc.

City of Boston and Boston Public Library Professional Staff Association,
21 MLC 1113 (ALJ 1994)

Detroit Newspaper Agency and The Detroit Free Press, 317 NLRB No. 155, 149 LRRM
1241 (1995)

Union Switch & Signal, Inc. and Society of Engineers, 316 NLRB 1025, (1995)
(employer must provide air quality study to union upon request)

A union is entitled to bring its own expert (e.g. an industrial hygienist) into the workplace
to evaluate workplace health and safety

City of Boston and Boston Public Library Professional Staff Association,
21 MLC 1113 (ALJ 1994) (Employer must give union industrial hygienist access to
workplace to conduct evaluation of dust levels and employee exposures generated by
construction in workplace)

Holyoke Water Power Company, 273 NLRB 1369, 118 LRRM 1179, enf'd, 778 F.2d 49,
120 LRRM 3487 (1st Cir. 1984), cert. denied, 477 U.S. 905 (1986) (industrial hygienist
working for union was entitled to access to noisy area of workplace to check noise
levels)

A union's right to access for a technical expert exists even if there is no pending health
and safety grievance, and even if the employer has already conducted an evaluation of the
workplace.

Holyoke Water Power Company, 273 NLRB 1369, 118 LRRM 1179, enf'd, 778 F.2d
49, 120 LRRM 3487 (1st Cir. 1984), cert. denied, 477 U.S. 905 (1986)

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SUMMARY OF MASSACHUSETTS PUBLIC RECORDS STATUTE

Mass. Gen. Laws ch. 66 §10 and ch. 4 §7, part 26

950 Code of Mass. Regulations §32.01 - 32.09

- A. Records, reports, documents generated or received by a public agency must be made available to members of public upon request -- would include reports about workplace evaluations, test results, etc. (ch. 66 §10(a), ch. 4 §7, part 26)
 - 1. Request may be oral or in writing, delivered in person or by first class mail (recommend written request) (ch. 66 §10(b); 950 CMR §32.05(3))
 - 2. Public agency must make requested documents available and/or must furnish one copy of document(s) (ch. 66 §10(a); 950 CMR §32.05(1) and (6))
 - a. Public agency may charge “reasonable fee” for retrieving and copying requested information (ch. 66 §10(a); 950 CMR §32.05(6))
 - 1. may include photocopying fee up to \$.20 per page (950 CMR §32.06(1)(a))
 - 2. may include fee based on hourly rate of lowest paid employee capable of performing tasks of search time, assembling documents, etc. (950 CMR §32.06(1)(c))
 - b. If cost of providing information will exceed \$10.00, public agency must give requester in advance, a good-faith estimate of cost of complying with request for information (950 CMR §32.06(2))

- c. Union may be entitled to information without cost in accordance with employer's obligation to provide information under collective bargaining statute
- B. Agency has ten days to provide information requested or to state reasons why information will not be available (ch. 66 §10(b); 950 CMR §32.05(2))
- C. An agency's refusal to give requested record can be contested by filing complaint with

Supervisor of Public Records
Office of Secretary of State
One Ashburton Place Room 1719
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